Regional Import and Export Trucking Co., Inc., Regional Distribution & Warehousing Service, Inc., Newport Transportation Co., Inc. ***and*** **Fernando Sanches and Local No. 819, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Party in Interest**

Truck Drivers Local Union No. 807 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO ***and*** **Fernando Sanches and Local No. 819, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Party in Interest.** Cases 22–CA–14582 and 22–CB–5544

August 25, 1995

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On February 7, 1995, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent Employer filed exceptions and a supporting brief, the Respondent Union filed exceptions, and the Charging Party filed exceptions, a supporting brief, and an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, only to the extent consistent with this Supplemental Decision and Order Remanding.[3]

1. During the hearing, the Respondent Employer moved to amend its answer to assert that discriminatee Frank J. Rizzo's backpay period ended in October 1986,[4] when Rizzo briefly worked for the Respondent Employer. The judge denied the motion on the basis that the Respondent Employer's evidence was not newly discovered and that the evidence should have been submitted in the underlying unfair labor practice case. The Respondent Union contends in its exceptions that the evidence should have been allowed because it involves the tolling of Rizzo's backpay.

We find that the judge erred by failing to allow the Respondent Employer to amend its answer. While evidence concerning the tolling of a discriminatee's backpay period is admissible during an underlying unfair labor practice hearing, a respondent is not required to present that evidence at that time. Such evidence may be introduced during the compliance stage of a proceeding, and a respondent is not precluded from offering such evidence at the compliance stage merely because the evidence was available to it at the time of the unfair labor practice hearing. See *Dean General Contractors*, 285 NLRB 573 (1987).

In the instant case, the Respondent Employer was denied the opportunity to present evidence concerning Rizzo's alleged brief employment with the Respondent Employer in October 1986. Accordingly, we shall permit the Respondent Employer to amend its answer, and shall remand for further proceedings to resolve the issue of whether Rizzo's backpay should be tolled as a result of his alleged October 1986 work for the Respondent Employer.[5]

2. The judge also struck the Respondent Employer's evidence concerning reinstatement letters sent to some of the discriminatees in November 1986 on the ground that the Respondent Employer had the opportunity to present those letters at the earlier unfair labor practice hearing, but did not do so. He also found, however, in the alternative that the letters would not have tolled the backpay periods for those discriminatees because the wage rates offered by the Respondent Employer were substantially less than what the discriminatees had been earning. We agree with the judge that these letters did not toll the backpay period. For the reasons set forth above, however, we do not rely on the judge's finding that the Respondent Employer failed to introduce the letters in the underlying unfair labor practice proceeding. Rather, we rely on the judge's alternative finding that in light of the lower wage rates, the jobs offered in the November 1986 letters were not substantially equivalent to the discriminatees' former employment.

3. We agree with the judge that the specification provided the appropriate wage rate for discriminatee Donald Groskranz. In so finding, however, we do not

[1] The General Counsel joined the exceptions filed by the Charging Party and adopted the Charging Party's brief with the exception of fn. 4.

[2] The Respondents and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the findings made herein, and to correct an inadvertent error in par. II(c) of the Order.

[4] All dates are in 1986, unless stated otherwise.

[5] Because the Respondent Employer was precluded from litigating this issue before the judge, we are unable to discern whether the job Rizzo allegedly performed in October 1986 was substantially equivalent to Rizzo's former employment. Of course, if that job was not substantially equivalent, it would not be sufficient to toll Rizzo's backpay.

In the event that backpay is not tolled as a result of the October 1986 employment, the amount earned at that job would, however, be counted as interim earnings. These issues are to be resolved in further compliance proceedings.

rely on the judge's rationale. Rather, we rely on the reasons set forth below.

At the time of the unlawful layoffs in 1986, there were separate payroll rosters for drivers employed by Distribution and drivers employed by Import, two of the entities comprising the Respondent Employer. The Import drivers were paid at a higher rate. The collective-bargaining agreement provided that Distribution drivers would, based on their seniority, replace Import drivers on the Import seniority list when Import drivers left Import's employ.

The specification provided that the wage rate for Donald Groskranz,[6] who worked for Distribution as a platform employee from September 1, 1978, to March 17, should be increased during the backpay period from the Distribution rate to the Import rate. The judge agreed that the increase was appropriate, finding that Groskranz should be treated the same as Rizzo, whom he found to be another Distribution employee who was paid at the Import rate when he was reinstated in 1989. The judge found that because these two employees had, prior to the discrimination, received identical wage rate treatment, they should continue to be treated identically.

The Respondent Employer excepts, arguing that the two employees were not, in fact, treated identically before the layoff. The Respondent Employer asserts that at the time of the layoff Rizzo was not a Distribution employee, as found by the judge, but was an Import employee being paid at the Import rates.

We find merit in the Respondent Employer's contention that the judge relied on a mistake of fact in his finding that Rizzo and Groskranz had been treated identically before the discrimination. The record indicates that Rizzo was not a Distribution employee at that time, but was an Import employee. Nonetheless, we agree with the judge that Groskranz is entitled to an increase to the Import rate as reflected in the specification. In so doing, we find that Groskranz would be entitled to the higher Import rate based on the collective-bargaining agreement.

As noted above, the collective-bargaining agreement covering the Distribution employees in 1986 provided, inter alia, that when a vacancy occurred, for any reason, on the Import seniority list, the senior, qualified Distribution driver/warehousemen advanced to the Import seniority list and received Import wages and terms and conditions of employment. The record shows that by January 1989, the time of Groskranz' reinstatement, there were vacancies at Import. Thus, at that time Groskranz would have advanced to the Import seniority list and received Import wages and terms and conditions of employment pursuant to the collective-bargaining agreement. Based on the above, we find that Groskranz is entitled to the Import wage rate as set forth in the specification.

4. In its exceptions, the Respondent Employer contends that discriminatee Christopher Walker had additional interim earnings not reflected in the specification which it is entitled to offset against backpay owed to Walker. The Respondent Employer relies on Walker's testimony that during the backpay period he briefly worked for Universal Trucking and his father. The judge failed to address this testimony. We find merit in the Respondent Employer's exceptions.

In *Colorado Forge, Corp.*, 285 NLRB 530, 543 (1987), the Board found that the employer was entitled to offset additional interim earnings based on the discriminatee's testimony at the hearing. The Board noted that although it is the burden of a respondent to produce evidence mitigating its backpay liability, there was nothing to put the respondent or the General Counsel on notice prior to the hearing that the employee had been engaged in that interim employment. Thus, the Board found that in light of the admission by the employee at the hearing that he had been engaged in interim employment, the respondent's failure to produce specific evidence regarding the precise amount of the interim earnings did not preclude those earnings from being properly deducted.

Similarly, in the instant case, Walker first testified at the hearing that he worked for Universal Trucking for approximately 2 or 3 months and earned about $8 per hour and that he made $200–$300 performing ''lumping'' for his father. Although the Respondent Employer did not produce evidence concerning the precise amount of these interim earnings, in light of Walker's admission we find that the Respondent Employer is entitled to deduct these earnings from gross backpay.[7] Accordingly, we shall remand for further compliance proceedings to determine the appropriate amount of interim earnings to be deducted from Walker's gross backpay.

5. The Respondent Employer excepts to the judge's failure to deduct from discriminatee Vincent Vollaro's gross backpay income from a restaurant that Vollaro opened during the backpay period. For the following reasons, we agree with the judge that under the circumstances presented here, income from the restaurant should not be deducted as interim earnings.

Vollaro worked for the Respondent Employer as a platform employee until he was discriminatorily laid off on June 28. Thereafter, Vollaro searched for work but was unsuccessful in finding a trucking job due to his age and health. In February 1987, he opened a small family restaurant which closed in November

[6] In his supplemental decision, the judge found, and we agree, that Groskranz and Nelson Morales are similarly situated to the other named discriminatees in the underlying case.

[7] As in *Colorado Forge*, supra, we find no basis for concluding that Walker intentionally attempted to conceal the existence of these earnings.

1987 due to lack of business. Based on credibility determinations, the judge found that Vollaro lost his business records in 1989. The judge also found, inter alia, that Vollaro's failure to produce the business records did not preclude him from receiving backpay without deductions for the restaurant income.

In its exceptions, the Respondent Employer contends that the income generated from the restaurant should be treated as interim earnings and deducted from Vollaro's gross backpay. We disagree.

It is well established that only net earnings from self-employment are considered to be interim earnings deductible from gross backpay. *Ryder System*, 302 NLRB 608, 617 (1991), enfd. 983 F.2d 705 (6th Cir. 1993). Here, the evidence shows that Vollaro had no net earnings from the restaurant, and that any earnings went toward paying bills. Vollaro used money from his wife's account and borrowed money from friends to start the restaurant. Vollaro took out a second home mortgage to keep operating his declining business and pay his family's living expenses. Further, he filed bankruptcy after the restaurant closed in November. Thus, we find that the Respondents failed to meet their burden of showing that the restaurant made any profits that could be considered net earnings. Accordingly, we find that the evidence supports the judge's findings that Vollaro's self-employment did not produce a net profit that can properly be treated as interim earnings.

6. The Charging Party excepts to the judge's deduction as interim earnings of all the 1986–1987 income discriminatee Charles Lampkin earned from his employment during the backpay period with the United States Postal Service (USPS), as well as his employment with two trucking employers, Textile Deliveries and KJB Transportation Company. We find partial merit in the Charging Party's exceptions.

Lampkin was employed by the Respondent Employer until he was laid off on February 26. Prior to his layoff, Lampkin obtained a part-time job with USPS working 5 hours a night, 5 days a week. After the layoff, Lampkin obtained a full-time driving job with Textile Deliveries. He also continued to work the 25-hour schedule at the USPS. In June 1986, Lampkin left Textile to work as a USPS ''flex'' (substitute) employee. During that time period, he worked approximately 40 hours a week plus overtime on a regular basis. He also obtained a job with KJB Transportation Company to supplement his income. At the end of 1987, he left KJB because he received more overtime from USPS.

In the specification, the USPS earnings are treated as interim income. The Textile and KJB earnings, however, are not treated as interim earnings because they are considered earnings Lampkin received from supplemental employment equivalent to his additional USPS earnings made prior to his layoff. In his supplemental decision, the judge rejected the specification's calculations and deducted as interim earnings not only the 1986 and 1987 USPS income but also the income from the trucking jobs. The judge reasoned that prior to his layoff Lampkin only obtained additional work to supplement his income from the Respondent Employer because at that time he was not working 40 hours per week. The specification, however, allotted Lampkin 40 hours per week plus considerable overtime. We disagree with the judge's rationale and find that only a portion of Lampkin's 1986–1987 interim income should be considered interim earnings to be deducted from gross backpay.

Section 10542.3 of the NLRB Casehandling Manual states that when a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay.[8]

Applying section 10542.3 to the instant case, we believe that the only amount of Lampkin's interim earnings that should be offset against his gross backpay is the amount of earnings from employment for the same number of hours that would have been available for Lampkin at the Respondent Employer. In its computation of gross backpay, the specification allots Lampkin 40 hours per week plus overtime. Thus, any pay for hours worked for any employer during the backpay period in excess of those hours which Lampkin would have worked at the Respondent Employer should be considered supplemental income and should not be deducted as interim earnings.[9]

Accordingly, we remand this issue for further compliance proceedings in order to recompute Lampkin's backpay in accordance with this Supplemental Decision.

7. During the hearing, the Respondent Employer presented evidence that its backpay liability should be reduced because it is making payments to discriminatees pursuant to an arbitration award obtained by the Respondent Union. The judge withheld ruling on this contention because it was unclear how the pay-

[8] See also *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 573 (5th Cir. 1966) (rule requiring deduction of interim earnings applies only to earnings during the hours when the employee would have been employed by the employer in question).

[9] Sec. 10542.4 of the NLRB Casehandling Manual states, inter alia, that if a discriminatee held a second job before the unlawful action, and continued to hold the job through the backpay period, earnings from the second job are not deductible, even if the supplemental employment is not continuous or is with different employers. Here, the record shows that Lampkin held a second job prior to his unlawful discharge, and that he continued to work a second job during the backpay period although it was for different employers. Based on the above, we find that Lampkin's supplemental earnings are not interim income that should be deducted from his gross backpay.

ments by the Respondent Employer impacted on the responsibility of the Respondent Union which is jointly and severally liable for the backpay.

In its exceptions, the Respondent Employer contends that its arbitration award payments should be offset against the moneys it owes under the specification. Similarly, the Respondent Union argues in its exceptions that the arbitration award absolves its liability.

Based on the record, we are unable to determine whether the arbitration award payments made by the Respondent Employer should properly serve as an offset from the amounts owed under this Order. Accordingly, we shall remand this issue for further compliance proceedings for a determination of whether those payments represent a remedy for the same losses involved in the instant case. In the event those payments are found to remedy the losses involved here, those amounts shall be treated as an offset against the amounts due under the terms of this Order.[10]

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge as modified below and orders that the Respondent, Regional Import and Export Trucking Co., Inc., Regional Distribution & Warehousing Service, Inc., Newport Transportation Co., Inc., Jersey City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Supplemental Order as modified.

1. Substitute the following for paragraph II(c).

''(c) Pay to the Local 807 Fund, on behalf of the discriminatees, the sums listed in the specification for each, with the modifications set forth, infra.''

2. Delete paragraph III(4) and renumber the subsequent paragraphs.

IT IS FURTHER ORDERED that the following issues be remanded to Region 22 for further appropriate action:

(a) Whether Frank J. Rizzo's backpay should be tolled in October 1986.

(b) A determination of the appropriate amount of Christopher Walker's additional interim income from Universal Trucking and from working for his father to be deducted from his gross backpay.

(c) A determination of the appropriate amount of Charles Lampkin's interim income from 1986–1987 to be deducted from his gross backpay.

(d) A determination of the effect, if any, of the Respondent Employer's payments pursuant to an arbitration award on the amounts owed by the Respondents pursuant to this Supplemental Decision and Order Remanding.

IT IS ALSO FURTHER ORDERED that the issues that do not require further appropriate action be severed from the remaining issues, and those discriminatees be made whole as directed by the judge in his supplemental decision.

Bernard S. Mintz, Esq. and *William E. Milks, Esq.*, for the General Counsel.

James J. Dean, Esq. and *James E. McGrath, Esq. (Putney, Twombly, Hall & Hirson)*, of New York, New York, for the Respondent Employer.

J. Warren Mangan, Esq. (O'Connor & Mangan), of New York, New York, for the Respondent Union.

Kent Y. Hirozawa, Esq. and *Morris Case, Esq. (Gladstein, Reif & Meginnis)*, of New York, New York, for Fernando Sanches and others.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The hearing was held in this case to determine, in accordance with the order of the Board in its decision reported at 292 NLRB 206 (1988), backpay amounts due 27 named discriminatees and any others ''similarly situated.''

In 1991 the original backpay specification issued, to which the Respondent Employer filed an answer and an amended answer. In 1992, an amended backpay specification issued, to which the Respondent Employer, in March 1992, filed its second amended answer.

The hearing opened in June 1992. Based on data submitted during the first 15 days of hearing, a second amended backpay specification (the specification) issued on January 24, 1994. Some of the appendices thereto were revised by letter dated February 15, 1994. As noted herein, further revisions are to be forthcoming.

The Respondent Employer answered that specification by submitting its earlier filed second amended answer and a letter of February 15, 1994. The Board's Regional Office replied to that letter by letter dated April 5, 1994.

On July 12, 1994, the Respondent Employer further expanded on its defenses; the General Counsel's posthearing brief addresses those matters, conceding some points and disputing others.

The Respondent Union's answer was stricken at the hearing. It then adopted the answer filed by the Respondent Employer.

The hearing closed in September 1994.

The issues raised by the amended pleadings and related issues litigated in the course of the hearing include:

(1) The length of the respective backpay periods of some of the 27 named discriminatees.

(2) Whether 2 employees were ''similarly situated'' with the 27 named discriminatees to be entitled to an offer of reinstatement and to backpay.

(3) The appropriateness of the gross backpay formula set out in the specification.

(4) The wage rates to be used in calculating gross backpay for some of the discriminatees.

(5) The extent of the Respondent Employer's and that the Respondent Union's liability respecting the claims for reim-

[10] We do not pass on the effect of such payments by the Respondent Employer on the liability of the Respondent Union. This issue shall be resolved in further compliance proceedings.

bursement of medical expenses incurred by some discriminatees during their backpay periods.

(6) The amounts to be contributed to a pension fund on behalf of the discriminatees.

(7) The extent, if any, to which some of the discriminatees had failed to seek, accept or keep interim employment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs by counsel for the General Counsel, the Charging Party, the Respondent Employer, and the Respondent Union, I make the following

FINDINGS OF FACT

A. *Background*

1. The prior proceeding

In the underlying unfair labor practice case, the Board found, inter alia, that Regional Import and Export Trucking Co., Inc. (Import) and Regional Distribution & Warehousing Service, Inc. (Distribution), a single business entity, had created Newport Transportation Co., Inc. (Newport) as their alter ego, and that 27 named employees were laid off in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Import, Distribution, and Newport, as one entity, are referred to herein as the Respondent Employer. The Board also found that the Respondent Union had violated Section 8(b)(1)(A) of the Act by having committed a breach of its duty to represent fairly these employees. The Board ordered the Respondent Employer to offer reinstatement to the 27 discriminatees and to any others ''similarly situated'' with them and it ordered the Respondent Employer and the Respondent Union, jointly and severally, to make these employees whole, with interest, for losses they suffered as a result of their unlawful conduct.

2. Applicable legal principles

In *Cliffstar Transportation Co*., 311 NLRB 152, 153 (1993), Administrative Law Judge Romano set out the following principles governing backpay cases.

The finding of an unfair labor practice is presumptive proof some backpay is owed, *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is ''to show the gross backpay due each claimant,'' *J. H. Rutter-Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230 (5th Cir. 1973), i.e., the amount the employees would have received but for the employer's illegal conduct, *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943).

The burden is then on a respondent to establish any affirmative defenses that would mitigate its liability, *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); namely, present unavailability of jobs, the amount of any interim earnings that are to be deducted from backpay amount due, and any claim of willful loss of earnings, *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). The burden includes showing a backpay claimant incurred a willful loss of earnings by refusing to take new employment or by neglecting to make reasonable efforts to find interim work *Inland Empire Meat Co*., 255 NLRB 1306, 1308 (1981), enfd. mem. 692 F.2d 764 (9th Cir. 1982). An employer may mitigate its backpay liability by showing a discriminatee has ''willfully incurred'' a loss by a ''clearly unjustifiable refusal to take desirable new employment,'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).

Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances, *Kansas Refined Helium Co*., 252 NLRB 1156, 1157 (1980). The Board's discretion is broad in its selection of a backpay formula that is reasonably designed to produce approximations of backpay due. *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970). When presented with both backpay and alternate backpay formulas, an administrative law judge must determine which is the ''most accurate'' method to determine backpay, *W. L. Miller Co*., 306 NLRB 936 (1992). Finally, it is also well established where there are uncertainties, or ambiguities, they are rightfully to be resolved in favor of the wronged party, rather than the wrongdoer, *Iron Workers Local 15*, 298 NLRB 445 (1990); *WHLI Radio*, 233 NLRB 326, 329 (1977); *United Aircraft Corp*., 204 NLRB 1068 (1973); and *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 572–573 (5th Cir. 1966).

B. *The Backpay Periods*

There is no dispute as to the dates on which the respective backpay periods for the 27 named discriminatees began.

The dates alleged in the amended specification as those on which the respective backpay period ended for the 27 named discriminatees are:

J. Berry—January 20, 1989
J. Bovill—January 20, 1989
T. Brocktus—Jan. 20, 1989
R. L. Brown—March 12, 1989
R. K. Brown—March 12, 1989
S. Cohen—January 20, 1989
J. Contreras—April 30, 1989
Cook—March 12, 1989
R. DeMase—March 12, 1989
P. Galileo—March 12, 1989
R. Grady—January 20, 1989
W. Gonzalez—January 20, 1989
J. Gorczyca—March 12, 1989
C. Lampkin—March 12, 1989
M. Litvinoff—January 20, 1989
M. Rasool—April 30, 1989
M. Riley—January 20, 1989
F. Rizzo—April 30, 1989
F. J. Rizzo—April 30, 1989
F. Sanches—March 12, 1989
L. Serafin—(Open)
D. Squicciarino—October 16, 1989
G. Stone—January 20, 1989
S. Van Dyke—January 20, 1989
J. Volaro—July 29, 1991
C. Walker—March 12, 1991
W. Warmbier—April 30, 1989

The Respondent Employer's answer states that the Respondent Employer had made valid reinstatement offers on the following dates to end the backpay periods of the 27

discriminatees named in the underlying decision of the Board: October 15, 1986; November 4, 1986; and, to 25 of them, on January 18 and 20, 1989.

The General Counsel and the Charging Party contend that the Respondent Employer's answer, insofar as it avers backpay ending dates in 1986, should be stricken as the Board had already ruled that reinstatement offers in 1986 were not valid.

In the underlying unfair labor practice proceeding, the Board affirmed the findings by Administrative Law Judge Robert T. Snyder that the charging party, Fernando Sanches, had not been restored to his former position of employment after he responded to a reinstatement offer sent to him by the Respondent Employer on November 4, 1986. The Board ordered the Respondent Employer to make a valid offer to him. The Board also affirmed Judge Snyder's finding that other offers of reinstatement made by the Respondent Employer in 1986 to the discriminatees were also invalid. During the hearing before me, I received evidence, proffered by the Respondent Employer, as to offers of reinstatement made in 1986. In view of the rulings made by the Board in the underlying unfair labor case respecting the reinstatement offer made by the Respondent Employer to Fernando Sanches, I struck the evidence thereon in the record before me on the ground that that matter had already been litigated.

At the hearing, the Respondent Employer moved to amend its answer to aver that the backpay period of one of the discriminatees, Frank J. Rizzo, ended in October 1986 because he worked for it briefly then. The General Counsel and the Charging Party objected, asserting that that contention should have been submitted during the hearing in the underlying unfair labor practice proceeding before Judge Snyder. Counsel for the Respondent Employer responded, asserting that the evidence as to Rizzo was ''newly-discovered'' inasmuch as he had just become aware of it. I find no merit in that contention as, obviously, the Respondent Employer has to be charged with knowledge of the entries on its own payrolls.

The Respondent Employer's answer also asserts that the backpay periods for some of the discriminatees ended in November 1986 based on letters sent them then offering them reinstatement. Those letters were virtually identical to the one sent Sanches, discussed above. Obviously, the Respondent Employer had the opportunity to present those letters to Judge Snyder at the earlier hearing but it did not. It can hardly claim now that those letters are newly discovered evidence. They are stricken now from the record as they purport to raise matters that are virtually identical to those considered and rejected in the underlying unfair labor practice case. In the event that the Board would now consider the merits thereon, I would hold that these letters did not end backpay for the discriminatees involved as the wage rates being paid by the Respondent Employer were substantially less than what the discriminatees had been earning.

There remains for consideration the offers made by the Respondent Employer in 1989. On January 18 and 20, 1989, it offered immediate reinstatement to 25 of the 27 named discriminatees. Due to oversight, it did not send offers to the other two named discriminatees until later.

According to the specification, backpay ended on January 20, 1989, for 10 of those 25 when the Respondent Employer offered reinstatement. The specification, however, does not accept that date for the remaining 15 who were sent offers then. Each of these 15, after receiving the offers, wrote letters to the Respondent Employer, which were dated from January 23 to February 8, 1989, and which asked what the wage rates of these discriminatees will be, what their seniority status is, and when to report for work. The Respondent Employer responded to these inquiries via letters dated from March 1 to April 30, 1989. For 14 of those 15, the specification accepts the respective dates, in March and April 1989, on which the Respondent Employer replied. The remaining discriminatee is Louis Serafin. The specification shows that his backpay period is ''open,'' i.e., that his backpay allegedly continues to run. The General Counsel alleges that, when he reported for work on May 1, 1989, he was not reinstated to his former job.

The Respondent Employer contends that the backpay period ended on January 20, 1989, for all 25 discriminatees, to whom it sent offers on that date, not just the 10 named in the specification. It denies that it failed to reinstate Serafin fully on May 1, 1989.

The General Counsel and the Charging Party assert that the backpay period of the 15 discriminatees, who wrote for information respecting the January 18 and 20 offers, were extended by reason of the Respondent Employer's alleged failure to reinstate Serafin, its delay in supplying the requested information and in view of the holding by the Board, in the underlying unfair labor practice proceeding, whereby it found invalid a reinstatement offer to a discriminatee in 1986 based upon subsequent treatment accorded that discriminatee.

Respecting the issue as to whether discriminatee Louis Serafin was denied reinstatement on May 1, 1989, the evidence is as follows.

After Serafin received the response to his inquiry concerning the January 20 offer, he reported to the Respondent Employer on May 1, 1989, for work. He was accompanied by another discriminatee, Frank J. Rizzo.

Serafin testified that he and Rizzo asked the Respondent Employer's president, Andrew Ferrara, on May 1 ''how steady the job would be'' and that Ferrara replied that he could not guarantee 40 hours of work every week. Serafin asked Ferrara if he could have 2 weeks to decide if he would return. (At that time and as of the date of the hearing, Serafin was working full time as a driver for the Great Bear Company, which has a collective-bargaining agreement with a local union of the International Brotherhood of Teamsters.) Ferrara consented to Serafin's request.

Serafin testified that he wrote to the Respondent Employer to state that he had not been offered his former job as he was not assured that he would work regularly and as Rizzo had been told on May 3, 1989, that there was no work available.

The Respondent Employer states that it never received any such letter from Serafin and asserts that it is a fabrication.

Rizzo testified that, when he reported for work on May 1, 1989, he too asked for a 2-week extension so that he could qualify for vacation pay. He was working then for another employer. His request was granted.

Ferrara's testimony as to his discussion on May 1, 1989, with Serafin raises no material credibility issue. It is unnecessary to decide whether Serafin wrote a letter to the Re-

spondent Employer after his conversation with Ferrara on May 1.

I place no weight on the hearsay statement in that letter that Rizzo was told on May 3 that there was no work available. Rizzo, in testifying, never alluded to any such remark. Further, Rizzo's account indicates that he was working for another employer as of May 3 so that he could qualify for vacation pay.

Nor can I presume that the reinstatement offer to Serafin was made in bad faith simply because the Respondent Employer, in 1986, had made a bad-faith offer. The Respondent Employee presumably is complying with the Board's remedial order and it is the General Counsel's burden to establish bad faith.

There is no evidence that Serafin, prior to the unlawful discrimination in 1986, had a guarantee from the Respondent Employer of at least 40 hours of work every week. There is no evidence that the Respondent Employer would not assign him work in accordance with his seniority status. In short, there is no probative evidence that Serafin was not offered reinstatement to his former job. The evidence, instead, is that he was offered reinstatement to the job. I find that his backpay period ended on April 30, 1989.

The General Counsel and the Charging Party argue that the backpay periods for the other 14 named discriminatees, who sought and got information after receiving the January 20, 1989 offers, ended when they were provided with data which enabled them to consider fairly whether to return. The Board has so held. See *Cliffstar Transportation*, supra at 154–161. I thus find that their backpay ending dates in the specification are correct.

C. *The Backpay Periods of Squicciarano and Vollaro*

The Respondent Employer did not send offers to Daniel Squicciarano and Vincent Vollaro two discriminatees, in January 1989. Its brief states that it believed then that they had passed away.

The specification states that Squicciarino's backpay period ended on October 16, 1989, when he did get an offer of reinstatement. The Respondent Employer's answer sets September 29, 1989, as the date his backpay period ended.

The Respondent Employer wrote Squicciarino on September 29, 1989, offering him his job back. I find that his backpay period ended then.

Vollaro did not receive a reinstatement offer until July 29, 1991. His backpay period ended then.

D. *The Status of Donald Groskranz and Nelson Morales*

As noted above, the Board's order directed the Respondent Employer to offer reinstatement to, not only the 27 discriminatees named in that Order but also to any other employees ''similarly situated'' with them. It also required for the Respondent Employer and the Respondent Union to make whole any such ''similarly situated'' employees for losses incurred by reason of their unlawful layoffs.

The General Counsel contends that there were two such employees laid off in 1986, Donald Groskranz and Nelson Morales. The Respondent Employer asserts that they had quit its employ in 1986 and that they were not unlawfully laid off.

Of the 27 employees whom the Board had found to have been unlawfully laid off in 1986, 4 had been unlawfully laid off prior to the last day on which Groskranz worked for the Respondent Employer, i.e., March 17, 1986. Morales' last day with the Respondent Employer was June 28, 1986, the same day on which 15 of the named discriminatees were unlawfully laid off.

Groskranz began working for the Respondent Employer on September 1, 1978. From 1983 until March 17, 1986, he worked as a platform employee on the night shift. He ''shaped'' for work, i.e., upon reporting, he was assigned to available work according to his seniority. He testified that he shaped every evening, that the last day on which he was assigned to work was March 17, 1986, and that he stopped shaping in May 1986 because his supervisor, Gerald Cruz, told him then that there was no work for him.

Cruz testified for the Respondent Employer that he had less work to assign to Groskranz and to the other platform workers because the Respondent Employer had lost two customers, Avon and Allied Stores. Cruz further testified that Groskranz told him in March 1986 that he could not live on what he earned by getting only 2 or 3 days of work each week. Cruz related also that Groskranz had stopped shaping for work.

In the underlying unfair labor practice proceeding, the Respondent Employer had contended that its layoff of the 27 named discriminatees was due to the loss of the Avon and Allied Stores accounts. The Board rejected that contention and found instead that unit work had been discriminatorily transferred to the alter ego, Regional, from Import and Distribution and that, as a consequence, the 27 employees named in the Board's order had been unlawfully laid off.

The Respondent Employer's assertion that Groskranz had quit on March 17, 1986, is not supported by any probative evidence. Rather, both Groskranz and Cruz testified that Groskranz had complained to Cruz sometime after March 17 that a less senior employee was working in his place. It is unlikely that Groskranz would have so complained if he had quit the Respondent's employ on March 17. I credit Groskranz' testimony that he was no longer assigned work after March 17, 1986, despite having shaped therefor, I find that he too was effectively laid off because of the discriminatory transfer of work to the alter ego, Regional. His employment status parallels that of the 27 discriminatees. I, therefore, find that Groskranz was ''similarly situated'' with those discriminatees when he was effectively laid off as of March 17, 1986.

As for Nelson Morales, he worked as a driver for Distribution from 1977 to June 1986. Upon arriving for work on a Friday in June 1986, he was met by drivers and platform employees who told him that they had just been informed that there was no work for them. Morales was their shop steward. Morales testified that he then spoke with the Respondent Employer's terminal manager who informed him that Distribution was out of business. As noted above, that was the last day he and 15 named discriminatees worked for the Respondent Employer.

At the hearing the Respondent Employer endeavored to establish, without success, that Morales had abandoned his employment with it in order to go into business for himself.

I find that Morales was laid off in conjunction with those employees who were found by the Board to have been un-

lawfully discriminated against and that he, thus, was similarly situated with them then.

E. *The Gross Backpay Formula*

The specification states that an appropriate method to measure the gross backpay due each discriminatee in each week of his backpay period is to add the regular hours worked that week by the replacements and to allocate to him, according to his seniority, 40 hours. If less than 40 hours are left to be allocated when his name is reached on the seniority roster, he will be credited with the lesser number. The number of his hours in each week are multiplied by his wage rate for that week. Overtime hours worked by replacements in a week, are allocated proportionately among the discriminatees.

An example of how this formula works follows. Assume that replacements had worked a total of 100 regular hours and 10 overtime hours in a week. The two most senior discriminatees entitled to backpay in that week will each be credited with 40 regular hours at their normal wage rates; the third most senior discriminatee is allotted the remaining 20 hours. As to the 10 overtime hours, the two senior discriminatees are each given two-fifths thereof (i.e., 4 hours) inasmuch as they each had received two-fifths of the 100 regular hours. The third most senior discriminatee is assigned one-fourth of the 10 overtime hours, i.e., 2. The overtime hours are to be paid at 1-1/2 times the regular wage rate.

The Respondent Employer's answer admits that this method of allocation is appropriate but denies that the number of hours worked by replacements should be used. The Respondent Employer contends that that number is too high. It asserts that the replacements worked more hours than the discriminatees would have worked but for the discrimination because they earned less and this enabled the Respondent Employer to obtain more business. This assertion is but a restatement of a contention the Board rejected in the underlying unfair labor practice proceeding and is, in fact, a less than subtle effort by the Respondent Employer to use the very discriminatory conduct it engaged in, in 1986, as a device to avoid its backpay liability. In its answer, it proposed an alternate method for computing gross backpay but that method too would perpetuate the discrimination.

The Respondent Employer's unlawful conduct created the difficulties now to be faced in trying to determine how much each discriminatee would have earned but for that conduct. The Respondent Employer cannot complain of the existence of these difficulties. The formula prepared in the specification is reasonable and will be used in computing gross backpay. See *W. L. Miller Co.*, 306 NLRB 936 at fn. 1 (1992).

F. *Wage Rates*

1. As to Morales

I found, supra, that Nelson Morales was similarly situated with the 27 named discriminatees. As such, he is entitled to receive from the Respondent Employer an offer of reinstatement to his former job and to be made whole, with interest, for losses suffered by reason of his discriminatory layoff. The specification, as the General Counsel concedes, contains errors as to the wage rate claimed for him in certain calendar quarters after his unlawful layoff. The General Counsel also has noted that, based on more recent data, revisions have to be made as to overtime hours allocated to Morales, pursuant to the formula discussed above. The General Counsel is preparing revised appendices. Morales' backpay period continues to run until he is offered reinstatement. The specification covers only the period from 1986–1991. Inasmuch as the appendices thereto relating to Morales are being revised and as supplemental appendices will have to be developed for the years after 1991 and until his backpay period ends, I will not ascertain net backpay for him. Any further supplemental proceeding, would obviously not require relitigation of matters decided now, e.g.—that Morales was similarly situated.

2. As to Litvinoff, Sanches, and Van Dyke

The specification listed certain wage rates for these employees which the Respondent Employer contends are based on speculation.

At the time of their layoff in 1986, these three discriminatees were on the seniority roster for Distribution drivers. There was a separate payroll for drivers of Import. The Import drivers were paid at a higher wage rate than the Distribution drivers.

The collective-bargaining agreement covering the discriminatees in 1986 provided that Distribution drivers, who were paid less than Import drivers, would, based on their seniority, replace Import drivers when those Import drivers leave the employ of Import. One of the General Counsel's witnesses, Morales, had his wages increased from the Distribution rate to the Import rate even though he remained on the Distribution payroll. Others on the Distribution payroll were receiving Import rates. Presumably, they had moved up when vacancies occurred, as did Morales.

Payroll records disclose that three drivers, paid at the Import rates, left the Respondent's employ in the period in which the Respondent Employer was unlawfully laying off the 27 discriminatees. The specification thereupon claimed the Import rate for the three senior Distribution drivers laid off, i.e., Litvinoff, Sanches, and Van Dyke. The Respondent Employer asserts that this claim is purely speculative as there was no upgrading of replacements when those three Import drivers left and as the General Counsel's theory presumes that Litvinoff, Sanches, and Van Dyke would have prevailed had they filed contractual grievances seeking the higher Import rate. The problem with the argument propounded by the Respondent Employer is that its own unlawful conduct in 1986 was responsible for creating the very issue it now poses. It is well settled that the party responsible for creating an ambiguous situation cannot benefit thereby. Instead, the ambiguity will be resolved against that party. On that basis, I find it appropriate to use the Import wage rates for Litvinoff, Sanches, and Van Dyke.

3. As to Vollaro and Serafin

The General Counsel's posthearing brief concedes that the specification listed incorrect wage rates for these two discriminatees for certain quarters in 1986. The correct rate for Vollaro and Serafin, respectively, are $12.84 and $12.405 per hour.

4. As to Groskranz

As found above, Groskranz was similarly situated with the discriminatees. He was a platform employee on the Distribution seniority roster at the time of his discriminatory layoff.

According to the specification, his wage rate, at one point thereafter, would have increased to the higher level paid to platform employees of Import. It appears that the higher Import rate was used on the theory that the higher rate was paid to another discriminatee who returned to work, i.e., Frank J. Rizzo, who also was a Distribution platform employee when discriminatorily laid off. Rizzo was paid at the higher Import rate when he returned pursuant to the Respondent Employer's offer of reinstatement.

The Respondent Employer states that there is no basis for the General Counsel to use the Import rate for Groskranz.

Groskranz and Rizzo are employees who had, prior to the discrimination, received identical treatment insofar as their wage rate was concerned. There is no good reason to treat them disparately now. The Respondent Employer logically could have explained why they should be treated differently. I, thus, find that it had the burden of proof thereon and did not meet it. The wage rate assigned to Groskranz in the specification is appropriate.

G. *Pension Fund Contributions*

The collective-bargaining agreement between the Respondent Employer and the Respondent Union provides that a certain amount of money will be contributed by the Respondent Employer, on behalf of each of its employees represented by the Respondent Union, to a pension fund (the Local 807 fund) for each hour worked by an employee. A higher contribution is to be made for an employee who is receiving the Import wage rate than is to be made for an employee being paid at its Distribution rate.

The specification asserts that, in order to make a discriminatee whole for losses he suffered as a result of his unlawful layoff, the Respondent Employer should contribute to the Local 807 fund for each hour he would have worked for the Respondent Employer in each quarter of his backpay period, the appropriate amount, be it at the Import rate or the Distribution rate.[1]

The Respondent Employer contends that it should be required to contribute, on behalf of a discriminatee, for only the first 250 hours he worked in any quarter as he enjoys no additional benefit for contributions made for hours he worked in excess of 250 in a quarter and as its conduct was violative of Section 8(a)(1) and (3) of the Act, not Section 8(a)(1) and (5).

The Local 807 fund gives an employee a credit for one calendar year quarter when he works 250 hours in that quarter. Upon his accumulating a certain number of quarterly credits, he is eligible for a pension. The amount of his pension is not affected by the fact that he worked more than 250 hours in a quarter.

Nonetheless, the General Counsel and the Charging Party reject the Respondent Employer's contention, asserting that an essential element in making a discriminatee whole, vis-a-vis the Local 807 Fund, in insuring that that Fund remains viable. To that end, they assert, the Respondent Employer is obligated to pay for all regular hours a discriminatee would have worked, just as it would have paid to the Local 807 Fund, had there been no discrimination.

The Board has considered and rejected essentially the same contentions now raised by the Respondent Employer. See *Achilles Construction Co*., 290 NLRB 240, 241 (1988); *Frank Mascali Construction*, 289 NLRB 1155, 1169 (1988); and *Acme Wire Works, Inc*., 251 NLRB 1567, 1570–1571 (1980). I thus find them to be without merit.

The Respondent Employer has offered a separate basis to have the amount of its liability to the Local 807 Fund reduced. It would offset the contributions made by those employers, for whom the discriminatees worked during their respective backpay periods, to pension funds which had reciprocity agreements with the Local 807 Fund.

Contributions to those pension funds are required under collective-bargaining agreements these employers have with other local unions of the International Brotherhood of Teamsters, including Locals 560, 617, 641, 707, and 851.

Generally, the reciprocity agreements operate along these lines. If an employee had worked steadily for the Respondent Employer for 15 years during which contributions were made on his behalf to the Local 807 Fund, and he worked 5 years with another employer, who contributed on his behalf to, e.g., the Local 560 Fund, he would receive, from both funds, pension eligibility credits of 20 years, usually sufficient to qualify for his pension. His pension, were he at an age to receive one from the Local 807 Fund, would be calculated at fifteen-twentieths of the amount that he would have received from it if he had spent all 20 years under the Local 807 fund. He would receive a separate pension from the Local 560 Fund, equal to five-twentieths of its 20-year pension figure. These funds have different contribution rates and each has its own provisions governing the number of credits needed for pension eligibility, varying rules as to the effect of a break-in-service, as to when an employee can receive a full or reduced pension and various other rules.

The record before me contains testimony by an actuary and by persons who administer or assist in administering the Local 807 Fund and those with which it has reciprocity agreements. The trustees of the Local 807 Fund accept the quarterly credits for pension eligibility given to a discriminatee by one of the reciprocal funds; in turn, the reciprocal funds accept quarterly credits for that discriminattee from the Local 807 Fund.

The Board has held that an employer has the burden of establishing that a particular payment qualifies as a deduction from gross backpay due. See *Dallas Times Herald*, 315 NLRB 700 (1994); *Manhattan Graphic Productions*, 282 NLRB 277, 280 (1988). The Respondent Employer thus has the burden of proving that the status of a discriminatee, as a result of contributions to reciprocal pension funds made on his behalf during his backpay period, was at least as good as it would have been under the Local 807 Fund, had he not been unlawfully laid off.

The Respondent Employer's evidence is that certain contributions were made to reciprocal funds on behalf of various of the discriminatees and at higher monetary rates than the rate contributed by the Respondent Employer to the Local 807 fund. It may, however, be too simplistic to infer that a discriminatee thereby was at least made whole, vis-a-vis his status under the Local 807 fund. It is possible that a discriminatee would receive credit from the Local 807 Fund

[1] The specification also sought any interest thereon that may be due the Local 807 Fund pursuant to the holding in *Merryweather Optical Co*., 240 NLRB 1213, 1216 at fn. 7 (1979). There is no evidence of any such interest due.

for a calendar quarter for which a smaller contribution was made to it. compared to a larger contribution in that same quarter to a reciprocal fund; yet he may not have worked enough hours in that quarter for his interim employer to receive a quarterly credit from that reciprocal fund. There seem to be other facts that relate to whether contributions to a reciprocal fund have made a discriminatee whole for losses incurred by the Respondent Employer's failure to contribute on his behalf to the Local 807 Fund as a consequence of its unlawful action, e.g.—each of these pension plans, from colloquy at the hearing, have their own rules governing breaks-in-service which may have an adverse effect on credits already earned.

The Respondent Employer has not presented a full profile, for each discriminatee, by which it may be found that they were made whole, as to their losses under the Local 807 Fund, by reason of contributions to funds with which that fund has reciprocity. I therefore find that the claims for contributions to the Local 807 Fund, as set out in the specification are valid, insofar as they pertain to calendar quarters in which gross backpay is allowed.

The Respondent Employer seeks offsets against claims for contributions to the Local 807 Fund on behalf of discriminatee Charles Lampkin based on contributions made by his employer, the United States Postal Service, during his backpay period. For substantially the same reason for denying offsets based on contributions to reciprocal funds, as discussed above, no offset will be allowed for contributions on his behalf by the United States Postal Service.

The Respondent Employer adduced evidence that discriminatees, Thomas Brocktus and Vincent Vollaro, began to receive pensions from the Local 807 Fund during their respective backpay periods. It asserts that contributions to the Local 807 Funds for the interval between the time they began to receive their pensions and the end of their backpay periods would in fact have an adverse effect on them as the Local 407 fund would reduce their future pensions because they had received pension moneys for those years in which the Respondent Employer should have been contributing on their behalf. That is a matter to be resolved by the trustees of the Local 807 Fund and those two discriminatees.

H. *Medical Expenses*

The collective-bargaining agreements covering the discriminatees obligates the Respondent Employer to contribute on their behalf to the Teamster Local 807 Health Plan (Health Plan) to cover hospital and medical bills they and their family members view.

The specification seeks to have the Respondent make whole eight of the discriminatees for hospital and medical expenses they incurred during their backpay periods. The Respondent Employer contends that the General Counsel has failed to prove what portions of these expenses would have been paid by the Health Plan. The General Counsel asserts, in essence, that it was the Respondent's burden to establish any dimunition in the amounts claimed in the specification. In *Hansen Bros. Enterprises*, 313 NLRB 599 (1993), the Board observed that ''[i]t is customary to include out-of-pocket medical expenses in make-whole remedies for fringe benefits lost when a respondent had not introduced evidence that would negate or mitigate its liability.'' The Board noted, in that case, that the out-of-pocket expenses claimed were those that would have been covered by a medical plan. It is clear that the Respondents had the burden of introducing evidence to negate or mitigate their liability. I find that the General Counsel, by placing in evidence records of the medical bills incurred by the discriminatees during their respective backpay period, established losses for which the Respondents, under the Board's order in the underlying unfair labor practice pending, were obligated to compensate those discriminatees. In the absence of evidence of any offsets thereto, I find that the Respondent Employer and the Respondent Union are jointly and severably liable for the amounts claimed in the specification for such expenses.

The Respondent Employer separately contends that it need not reimburse discriminatees for any bills that they had not paid. It urges that any payment to a discriminatee for a medical bill which he had not paid and which is long past due, would be a windfall to that discriminatee. The short answer to that contention is that the Respondents had, but did not meet, the burden of proving that there was no longer any liability of the discriminatee for medical expenses by reason of a waiver or an applicable limitation of actions respecting recovery thereon.

I. *Offsets to Gross Backpay*

The Respondent Employer's answer set forth various grounds upon which the gross backpay claims of 24 of the discriminatees should be reduced. One of those grounds, alleged failures to allow for earnings from various interim employees, was rendered moot, in good part, when those earnings were credited against gross backpay upon the issuance of the specification on January 24, 1994. In its posthearing brief, the Respondent Employer asserts that the claims for eight discriminatees should be reduced; the grounds therefor include, failure to credit interim earnings, and failure to seek or retain interim employment. Its contentions pertain to the following discriminatees.

1. James Bovill

The Respondent Employer's answer avers that Bovill engaged in gross misconduct which resulted in his being discharged on March 14, 1987, by an interim employer. The Respondent Employer would, for that reason, bar any backpay claim for him from that point.

The Respondent Employer's brief states that Bovill was discharged by Compass Lincoln Mercury because one of its customers overheard him referring to her as a ''bitch.''

Bovill has worked steadily for several employers during his backpay period. One was Compass Ford, an automobile dealer; Bovill worked there as a service writer. A woman customer had become ''really nasty'' to him one day on the telephone. He transferred her call. In doing so, he referred to her as a ''bitch'' without realizing she was still on the line. He was discharged a week later, November 3, 1987. A week later, he got a job with Riverside Ford. He was employed there as of the date of the hearing.

The Respondent Employer's assertion that Bovill forfeited any backpay accruing after his discharge from Compass Ford is clearly without merit as it is well settled that a claimant, assuming he was discharged for a reason warranting forfeiture of backpay, is not deprived of his entire claim but only so much as he would have earned on the interim job from

which he was discharged. See *Hansen Bros. Enterprises*, supra at 607. See also *La Favorita, Inc*., 313 NLRB 902, 904 (1994).

A question remains as to whether Bovill's backpay should be reduced by the wages he would have earned during the week between his discharge from Compass Ford and the week he began working for Riverside. The question turns on whether the Respondent Employer has shown ''deliberate or gross misconduct on (Bovill's part which would establish a willful loss of employment,'' i.e., that he ''committed [an] offense involving moral turpitude . . . so outrageous as to suggest deliberate courting of discharge.'' See *Ryder System*, 302 NLRB 608, 610 (1991). The Respondent Employer has not met its burden theron. Bovill had worked for the Respondent Employer as a driver. In the course of mitigating backpay, he took a job requiring different skills, one requiring that he learn how to deal with, at times, obstreperous consumers. The evidence discloses that he was on that job for a brief period when he took a call from a woman, whom demeanor was antagonistic. Bovill, aggravated by it, was inadvertently overheard by her when he vulgarly characterized her demeanor towards him. In these circumstances, I find that his action did not suggest that he was deliberately courting his discharge.

2. Thomas Brocktus

The Respondent Employer would bar backpay for Brocktus as of the date, March 1, 1987, he began receiving a pension from the Local 807 Fund.

Brocktus did not testify. The specification reveals that, after his unlawful layoff, he began working in early 1987 for Supermarkets General Corporation and that he was still employed by that company when his backpay period ended. On February 2, 1987, he filed an application with the Local 807 Fund, stating therein that he was seeking an early retirement pension because he ''cannot find work'' other than ''putting items on a shelf for (Supermarkets General).'' Since March 1, 1987, he has been receiving a pension of $445 a month from the Local 807 Fund. The administrator of that Fund testified that a pension does not preclude a pensioner from working; a pension would not be paid, however, for any month in which a pensioner worked for an employer who contributes to the Fund.

There is no basis to find that Brocktus forfeited backpay by filing for an early retirement pension because he was unable to find employment comparable to the job he lost as a result of the unlawful discrimination. The Board has held that a disciminatee's receiving social security disability benefits above is not prima facie proof that he is no longer in the job market. *Superior Export Packing, Co*., 299 NLRB 61 fn. 1 (1990). Analogously, the fact that Brocktus received pension benefits did not establish prima facie that he left the job market. In any event, even had a prima facie showing been made therefor, it would have been rebutted by the fact that Brocktus has interim employment.

3. Richard DeMase

At the hearing, the parties stipulated that DeMase's earnings of $639 during his employment with Riis Paper Company in the third quarter of 1987 were additional interim earnings which will reduce hit net backpay correspondingly. That stipulation was received and his claim will be so revised.

4. Donald Groskranz

As noted earlier in this decision, Groskranz has not been offered reinstatement and, thus, his backpay period continues to run.

The Respondent Employer contends that Groskranz failed to look for interim employment since his layoff in early 1986. The specification lists no interim earnings for him (other than $92) from then and until the first quarter of 1990.

Groskranz had worked for the Respondent Employer as a platform employee, earning $8.65/hr., when he was unlawfully laid off on March 17, 1986. He testified that he had looked for work with various employers in the trucking industry during his backpay period but without success. The Respondent Employer would have me discredit that testimony, citing various contradictions in his account. Those I attribute more to the long interval of time that has transpired rather than to an effort on his part to conceal facts. He and another discriminatee were hired by an interim employer. Groskranz worked but 1 day and was told that there was no more work for him; the other discriminatee had substantial interim earnings from that company.

I find that the Respondent Employer has not met its burden of establishing that Groskranz willfully failed to seek or keep interim employment.

5. Charles Lampkin

The Respondent Employer would treat as interim earnings the wages that Lampkin received from two companies, other than the United States Postal Service (USPS) after his unlawful layoff in February 1986. The Charging Party contends that the wages Lampkin received from those two companies corresponded to extra wages he earned while he was working for the Respondent Employer prior to the time of his layoff.

Lampkin's working hours, prior to his unlawful layoff, had been reduced. He obtained a part-time job with the USPS as a casual employee to supplement his earnings. After his unlawful layoff and thus with the start of his backpay period, during which the specification alleges that he would have worked full time for the Respondent Employer, he began working full time for Textile Deliveries. He left that company after several months to again work for the USPS as a ''flex'' employee. The record suggests that he was working there as a regular part-time employee for the USPS, often however, for as much as 40 hours a week. He obtained a job with KJB Transportation Co. to supplement his income.

The specification treats, as interim earnings, only the wages he received form the USPS and not those from Textile or KJB, apparently on the premise that his earnings from Textile and KJB corresponded to the earnings Lampkin received from his job as a casual employee prior to his unlawful discharge, i.e., while he was then moonlighting. The difficulty with that premise is that Lampkin worked as a casual then because he was not working 40 hours a week for the Respondent Employer whereas the specification allots to him, during his backpay period, 40 hours a week plus considerable overtime. Against these, it is proper to offset his wages as a ''flex'' employee of the USPS in 1986 and 1987 and also his earnings with Textile and KJB. Thus, the $4242 he

earned with Textile in the second quarter of 1986 will be added to his interim earnings. The $5577 he earned from KJB from July to December 1986 will be divided evenly between the third and fourth quarters of that year, also as interim earnings. The $16,221 he earned in 1987 will similarly be distributed among the four quarters of that year as interim earnings.

6. Nelson Morales

As found above, Morales' backpay period continues to run since his unlawful layoff in July 1986.

He was unable to work for 2-1/2 months as a result of an injury he suffered in December 1988 and he did not seek work in 1989. The interval December 1, 1988, to December 31, 1989, will be excepted from his backpay period. The backpay claim for his fourth quarter of 1988, thus will be reduced by one-third and that for 1989 stricken.

The General Counsel's brief states that the overtime claim for Morales as set out in the specification has to be corrected as does his wage rate.

As gross backpay for him continues to accrue and as revisions in the specifications are presumably to be offered without objection, it appears to be appropriate to defer recommending a tentative award as the amount of net backpay due Morales.

I find no merit in the Respondent Employer's contention Morales had willfully concealed interim earnings in 1986. The testimony offered in support thereof was but speculation.

7. Vincent Vollaro

Vollaro's backpay period runs from June 28, 1986, to July 28, 1991.

The Respondent Employer argues in effect that Vollaro abandoned his job after his unlawful layoff and, in support thereof, cites his statement, when he applied for a pension, that he was ''too old and sick to work in trucking.'' In view of the testimony before me in the record as to the limited availability of jobs in the trucking business and the competition therefor, I do not view Vollaro's statement, in support of his pension application, as an abandonment of his job. At any time, the Respondent could have, with reasonable inquiry, ascertained his position therein in 1986 by offering him reinstatement. There is no justification to substitute speculation therefor.

The specification, however is to be revised to except the interval, February 2 to September 12, 1988, when Vollaro was unable to work due to an injury he suffered. Also, all dates after February 15, 1991, are excepted from his backpay period as his testimony discloses that he has, since then, been unable to work due to illness.

The Respondent Employer also contends that Vollaro's failure to produce records as to the restaurant business he and family members operated during a portion of his backpay period, precludes backpay for him. Vollaro, however, had lost these records in 1989. The Respondent Employer's argument that Vollaro's testimony thereon is untruthful is not persuasive. I, thus, find no merit to this contention.

8. William Walker

The Respondent contends that Walker forfeited backpay, asserting that he was discharged by an interim employer Van Eck Trucking, for misconduct on December 9, 1986.

Walker testified that he was discharged by Van Eck Trucking soon after he had a dispute there as to the amount of his compensation. The Respondent Employer called Van Eck's vice president, Vito Losito, as a witness. He testified that Walker was fired because a customer complained it had a fight with him. Walker denied having engaged in any such fight. The hearsay evidence offered by the Respondent Employer that Walker had a fight with a customer of Van Eck is not persuasive. I find no merit to its contention that Walker engaged in misconduct which resulted in the loss of interim employment.

Walker obtained employment with another company shortly after his employment with Van Eck ended.

The evidence is insufficient to sustain a finding that Walker willfully failed to pursue interim employment.

J. *Backpay Payments Made*

The Respondent Employer placed in evidence cancelled checks which bear the names of some of the discriminatees thereon. It adduced testimony that these checks were payments in part of an arbitration award issued pursuant to proceedings brought against it by the Respondent Union. It contends that its backpay liability should be reduced thereby.

The General Counsel notes that the normal method followed in making discriminatees whole for monetary losses is to transmit checks via the Board's Regional Office.

The Board's order provides that the Respondent Union is jointly and severally liable for backpay. As it is unclear how the payments by the Respondent Employer impact on the responsibility of the Respondent Union, I must withhold ruling on this contention of the Respondent Employer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

I. The Respondent Employer, its officers, agents, successors, and assigns, shall offer Donald Groskranz and Nelson Morales immediate and full reinstatement to their former jobs in the same manner as that provided for in the Board's Order in the underlying unfair labor practice proceeding for the other 27 discriminatees.

II. The Respondent Employer and the Respondent Union and their respective officers, agents, successors, and assigns, shall, jointly and severally

(a) Make whole Donald Groskranz and Nelson Morales for their losses in the same manner as that provided for in the Board's Order for the 27 named discriminatees.

(b) Pay to each of the discriminatees named in the Board's Order the amounts of net backpay and medical expenses list-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ed for each in the appendices to the specification,[3] with the modifications provided for, infra, and with interest thereon as provided for in the Board's Order.

(c) Pay to the Local 408 Fund, on behalf of the discriminatees, the sums listed in the specification for each, with the modifications set forth, infra.

III. The General Counsel shall recompute[4] the specification as follows:

1. Delete from Serafin's claim moneys sought for periods after April 30, 1989; from Squicciarino's after September 29, 1989; and from Vollaro's, after July 25, 1991.

2. Recompute Serafin's gross backpay from periods in 1986 at his wage rate of $12.405 and Vollaro's at $12.86.

3. Deduct $639 from DeMase's backpay claim in the third quarter of 1987.

4. Deduct $2788 from Lampkin's gross backpay claim for the third quarter, 1986; $2789 for the fourth quarter, 1986; and $4180 for each quarter in 1987.

5. Delete backpay for Vollaro from February 2, 1988, to September 12, 1988, and after February 25, 1991.

6. Revise the appendices to date for Morales based on change in his wage rate and overtime hours as referred to, supra.

7. On termination of the backpay periods of Groskranz and Morales, prepare and serve supplemental appendices for them upon all parties.[5]

[3] App. E was corrected by General Counsel's letter of February 15, 1994, insofar as it relates to pension contributions on behalf of Robert Brown, Joseph Gorczyca, Nelson Morales, and Marshall Riley.

[4] In *Hansen Bros.*, supra, the Board used this procedure in similar circumstances.

[5] This is not to be construed as warranting relitigation of their claims as presented in the specification, with modifications as provided for herein.